Sea Mar Community Health Centers *and* Office and Professional Employees International Union, Local 8, AFL–CIO. Case 19–CA–28595

September 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 24, 2003, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

The Respondent is a nonprofit organization that operates medical and dental clinics. This case involves the Respondent's closure of a dental lab that was being operated in one of the Respondent's clinics. The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the decision and effects of the decision to close the lab. The judge also found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over wages for the dental lab technician position.[3]

For the reasons stated below, we find that the Respondent was not obligated to bargain over the decision to close the lab or over the effects of that decision. The lab and the lab technician position were created by a person who had no authority to do so, and the lab operated without Respondent's knowledge and in direct contradiction to its express order. The Respondent's order to end this rogue operation—once it was discovered—is a core entrepreneurial decision that is not subject to the duty to bargain. Accordingly, we reverse the judge and dismiss those allegations. In addition, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over wages. However, we amend the judge's remedy.

I. BACKGROUND

The Respondent employs about 1000 employees in 28 different facilities, including a dental clinic in Seattle, Washington, where the events at issue here took place. The Union is the collective-bargaining representative for a unit that includes all employees of the Respondent except managers, confidential employees, contracted employees, temporary employees, and supervisors.

The Respondent's dental clinics, including the Seattle clinic, provide general dentistry services. A small percentage of the Respondent's patients require dentures or other dental appliances. Until late 2001, the Respondent's practice at all of its clinics was to prescribe and fit those patients with dental appliances, but to use outside commercial labs to manufacture most of the appliances.

In May 2001, the Respondent hired Jose Cornejo as a CSR dental assistant at the Seattle clinic. The main function of the CSR dental assistant is to sterilize dental equipment. For the first few months after he was hired, Cornejo performed sterilization work. In late 2001, however, the Respondent's dental director, Dr. Alex Narvaez, began training and assigning Cornejo to manufacture dental appliances, rather than sending that work to outside labs. Narvaez took this action on his own, without the Respondent's knowledge or consent. Cornejo performed this work in a vacant room in the clinic, which clinic personnel were using as a lab.[4] By 2002, Cornejo was spending the majority of his time as a dental lab technician making dental appliances rather than sterilizing equipment, although the dentists continued to use outside labs to manufacture some of the more complex appliances.

Narvaez reports to the Respondent's CEO, Rogelio Riojas. In March 2002, Narvaez met with Riojas and Deputy Director Mary Bartolo.[5] Narvaez proposed that the Respondent develop an expanded dental lab and create a dental lab technician position. The main duty of the employee holding the position would be to fabricate dental appliances (i.e., the work that Narvaez had assigned Cornejo). None of the Respondent's other clinics had a dental lab technician position. Instead, those clinics used outside labs to manufacture most dental appliances.

[1] The General Counsel argues that the Respondent's Brief in Support of Exceptions fails to comply with Sec. 102.46(c)(2) of the Board's Rules and Regulations, because the brief does not contain "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." We find that the Respondent's exceptions and brief are in substantial compliance with the Board's Rule.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to our findings.

[3] The judge dismissed an allegation that the closure of the lab and refusal to bargain over wages also violated Sec. 8(a)(3) and (1). There are no exceptions to the dismissal.

[4] The Respondent's long-term plan was to convert the room into an additional patient care area, but at that time the Respondent did not yet have the equipment to do so.

[5] Bartolo also reports to Riojas.

The record includes testimony concerning the Respondent's procedures for creating new job positions and offering new services such as those suggested by Narvaez. Regarding job positions, the person seeking to create the position must fill out a written request and job description and meet with Riojas and Bartolo, who have the authority to give final approval on behalf of the Respondent. Regarding new services, Riojas determines whether to recommend the service to the board of directors, which then makes the final decision. Thus, Narvaez did not have authority to decide on his own to create a new position or to expand lab service.

During the March 2002 meeting with Narvaez, Riojas and Bartolo discussed Narvaez' proposal and made a final decision to reject it. They did so for several reasons: a dental lab would take up clinic space that otherwise could be used for patient care, the dentist supervising the lab technician would need to take time away from patient care to do so, and adding a new position and performing the work in-house would not be cost-effective. Riojas did not recommend to the board of directors that the Respondent expand the dental lab. The day after Riojas and Bartolo met with Narvaez, Bartolo told Narvaez to return Cornejo to his original duties as CSR dental assistant.

Despite Bartolo's direct order, Narvaez continued throughout 2002 and early 2003 to have Cornejo manufacture dental appliances in-house, without the Respondent's knowledge or consent. Initially, Narvaez instructed Cornejo to finish denture work that had been in progress in March 2002 when Riojas and Bartolo rejected Narvaez' proposal to create a dental lab technician position. Narvaez testified that "it just continued" thereafter, and he took advantage of the fact that the room being used as a lab was still vacant and had not yet been converted to a patient care area. Narvaez also testified that he wanted to demonstrate that the Respondent had made the wrong decision in rejecting Narvaez' proposal.

In January 2003,[6] the Respondent and the Union began negotiating a new collective-bargaining agreement. During a bargaining session in late March, the Union informed the Respondent's bargaining team that Cornejo was performing dental lab work, which was outside his classification of CSR dental assistant. The Respondent's bargaining team told the Union that they would look into the issue. After the bargaining session, Judith Puzon and Carolina Lucero, two members of the Respondent's bargaining team, talked to Narvaez about the work Cornejo was performing and reviewed the proposed job description for dental lab technician that Narvaez had submitted to Riojas and Bartolo in March 2002.[7]

At the next bargaining session, on April 4, Puzon told the Union that Cornejo was classified as a dental lab technician, not a CSR dental assistant. The Union's bargaining team stated that this position was not listed on the salary schedule in the collective-bargaining agreement and that the Respondent was obligated to bargain over the wages for the position. The Respondent refused.

Lucero or Puzon also informed CEO Riojas of the Union's concern that Cornejo was performing dental lab work outside his job classification. This was the first notice Riojas received that Narvaez had disregarded the Respondent's March 2002 decision not to operate an expanded dental lab or to create a dental lab technician position.

Sometime after the April 4 bargaining session, Riojas and Mike Leong, the Respondent's vice president for legal affairs, met with Narvaez. Leong asked Narvaez if Cornejo was in fact still performing dental lab work. Narvaez said that Cornejo was. Riojas reminded Narvaez that Riojas had rejected Narvaez' proposal in 2002 to create the dental lab technician position, and he instructed Narvaez immediately to stop operating the lab and to return Cornejo to his sterilizing duties.

Narvaez complied. On April 9, the Respondent stopped operating the dental lab, resumed sending dental appliance work to outside labs, and reassigned Cornejo to sterilizing dental equipment. The Respondent did not give the Union notice and an opportunity to bargain before reestablishing the clinic's approved operational structure.

II. JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's April 4 request to bargain over wages for the dental lab technician position, by failing to give the Union notice and an opportunity to bargain over the April 2003 decision to close the dental lab, and by failing to give the Union notice and an opportunity to bargain over the effects of closing the lab.

The Board and the courts have developed two lines of cases in evaluating whether an employer's decision to remove bargaining unit work is a mandatory subject of bargaining. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that a decision to subcontract bargaining unit work is a mandatory subject of bargaining where the employer is

[6] All dates from this point forward are in 2003 unless otherwise specified.

[7] As explained above, the Respondent had denied Narvaez' request to create the dental lab technician position in March 2002, but the Respondent's negotiators apparently did not know that.

merely replacing employees in the bargaining unit with employees of an independent contractor to do the same work under similar working conditions. Id. at 215. In *Torrington Industries*, 307 NLRB 809 (1992), the Board further stated that such subcontracting decisions do not involve a change in the scope and direction of the business and thus are not "core entrepreneurial decisions" outside the scope of the bargaining obligation.

In contrast, the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), found that a decision to close a portion of the employer's operation for economic reasons was not a mandatory subject of bargaining. The partial closure was a significant change in the employer's operation, and the Court held that the employer was privileged to make such core managerial decisions without bargaining with the union.

Applying this precedent, the judge found that the Respondent's decision to close the dental lab and resume using outside labs to manufacture dental appliances was more similar to the mere replacement of one group of employees with another in *Fibreboard* and *Torrington Industries*, than to the partial shutdown in *First National Maintenance*. Therefore, the judge found that the Respondent's decision was a mandatory subject of bargaining, and that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the decision. The judge further found that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the effects of the decision prior to implementation.

The Respondent excepts, arguing that its action more closely corresponded to the partial closure in *First National Maintenance*, and thus closing the lab without bargaining with the Union did not violate the Act.

III. ANALYSIS

A. Decision to Close the Dental Lab and Return Cornejo to Sterilizing Equipment

For the reasons stated below, we reverse the judge and find that the Respondent did not violate Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the decision to close the dental lab and return Cornejo to sterilizing equipment. Under the particular facts of this case, it would not effectuate the purposes of the Act to impose on the Respondent an obligation to bargain.

Contrary to the judge and the Respondent, we do not find the present case analogous to *Fibreboard*, *Torrington*, or *First National Maintenance*. All of those decisions addressed whether the employer was required to bargain over a management decision to change or discontinue some facet of its business that the employer had knowingly established and operated. See *Fibreboard*, supra (decision to subcontract maintenance operation after undertaking cost study); *First National Maintenance*, supra (decision to discontinue a contractual arrangement the employer had established with a particular customer); *Torrington*, supra (decision to replace unit employees with a nonunit employee from another plant). The circumstances here are significantly different and require a different approach.

In March 2002, the Respondent, through CEO Riojas and Deputy Director Bartolo, rejected Narvaez' proposal to operate an expanded dental lab and to create a dental lab technician position.[8] The Respondent instructed Narvaez accordingly. Without either the Respondent's knowledge or consent, Narvaez disregarded those instructions. In April 2003, when the Respondent learned that Narvaez had ignored its instructions and continued to have Cornejo manufacture dental appliances, the Respondent immediately took action to restore its operations to what the Respondent had authorized and believed to be in existence since March 2002. The Respondent closed the lab, resumed using outside labs to fabricate dental appliances, and reassigned Cornejo to his authorized duties as CSR dental assistant. Thus, the issue is not whether the Respondent was obligated to bargain over a decision to discontinue an operation the Respondent had authorized or knowingly established. Rather, the issue is whether the Respondent, having discovered an operation that was not only unauthorized but had been considered and expressly rejected the year before, should be required to bargain with the Union before discontinuing that operation.[9]

In light of these unique circumstances, the present case cannot neatly be analogized to the decision-bargaining cases analyzed by the judge. Nor have we found other Board decisions that address this unusual factual scenario. Accordingly, we resolve this case by examining whether it would effectuate the basic policies of the Act to mandate bargaining under the circumstances presented here. We find that it would not.

[8] There is no allegation that the March 2002 decision was unlawful.

[9] Had the Respondent approved Narvaez' proposal for an expanded dental lab, established the lab and created the dental lab technician position, and later unilaterally discontinued the lab and outsourced the lab work, we would find it appropriate to analyze (as the judge did) whether the decision to close the lab was more analogous to the replacement of one group of employees with another in *Fibreboard* and *Torrington* or to the decision to close part of a business in *First National Maintenance*. The dissent contends that *Fibreboard* and *Torrington* are applicable, yet cites no authority in which the Board or courts have applied *Fibreboard* or *Torrington* under circumstances similar to those here.

An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in a mandatory subject of bargaining without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Under Section 8(d), "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. However, "Congress did not intend to mandate bargaining over every conceivable issue arising between management and labor." *NLRB v. Plymouth Stamping Division*, 870 F.2d 1112, 1115 (6th Cir. 1989), cert. denied 493 U.S. 891 (1989).

In a unilateral-change case, "the relevant inquiry . . . is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999)). We apply those principles here.

Closing the dental lab was a "change" only in the sense that Cornejo no longer performed dental lab work, as he had been doing since late 2001. However, the Respondent had never decided or agreed, in the first instance, to operate an expanded dental lab or to have a unit position devoted to manufacturing dental appliances. To the contrary, the Respondent decided in March 2002 *not* to operate an expanded lab or to create a dental lab technician position.[10] Narvaez lacked the authority on his own to create a new job position or to expand the scope of services offered by the Respondent. After March 2002, the expanded lab existed, and Cornejo performed lab work, only because Narvaez had defied the Respondent's instructions without the Respondent's knowledge. When the Respondent learned in April 2003 that Cornejo was still performing dental lab work, the Respondent simply took action to conform operations to its earlier decision, which the Respondent had made—and which the Respondent believed had been implemented—in March 2002.

The dissent's rationale for finding Narvaez' lack of authorization irrelevant is flawed. It relies on decisions holding that an employer is bound by the unlawful acts or coercive statements of its supervisors, even if the specific acts and statements were unauthorized. First, in the present case, Narvaez' conduct is not alleged to be unlawful. The issue is whether the *Respondent* acted unlawfully in discontinuing a dental lab that Narvaez insubordinately operated. Second, the principle that an employer is bound by a supervisor's unlawful conduct is based, in turn, on the principle that the supervisor is an agent of the employer for the purposes of that unlawful conduct. Although the Respondent admitted at the hearing that Narvaez was an "agent generally," the context of that statement shows that the Respondent was admitting only that Narvaez was an agent for matters within his supervisory authority. A person "may be an agent of the employer for one purpose but not another," *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), and it is not reasonable to read the Respondent's testimony as an admission that Narvaez' agency was unlimited.

The Board may decline to find agency when a person acts outside the scope of his employment. Id. Narvaez' supervisory status does not provide him with unlimited authority to bind the Respondent on any and all matters. The evidence does not support our colleague's finding that Narvaez was an agent for purposes of expanding the Respondent's operation to include an in-house dental lab never approved by the board of directors and expressly rejected by the CEO and deputy director. That conduct was clearly outside the scope of Narvaez' employment.[11] Indeed, the elaborate procedures adopted by the Respondent to make such decisions underscore Narvaez' lack of authority to assign Cornejo lab technician's duties.[12]

[10] The judge acknowledged this fact in the portion of his decision dismissing the allegation that the closure of the lab violated Sec. 8(a)(3): "it must be remembered that the decision to close the lab had been made [in 2002]. It was only Dr. Narvaez [sic] insubordinate decision to retain the dental lab that produced the issue during bargaining in 2003."

[11] The dissent cites the Restatement (Second) of Agency for the proposition that a forbidden act *may* be within the scope of employment. The Restatement also provides that "the prohibition by the employer may be a factor" in determining whether the act was within the scope of employment. See § 230 cmt. c. The Restatement further provides that conduct is not within the scope of employment "if it is different in kind from that authorized" (§ 228(2)) and that whether the act "is outside the enterprise" of the employer is also to be considered (229(2)(e)). Each of these factors supports our conclusion that the operation of the lab was not within the scope of Narvaez' employment and weighs strongly against finding agency.

[12] To the extent that apparent authority is applicable here, the record does not show that Narvaez had apparent authority to operate the lab and assign lab work to Cornejo. Apparent authority "results from a manifestation *by the principal* to a third party that creates a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question." *Pan-Oston*, supra at 305–306 (emphasis supplied). Narvaez' conduct alone cannot establish apparent authority, and the record does not contain sufficient evidence to prove that the Respondent (as opposed to Narvaez himself) took any action from which employees would reasonably conclude that Narvaez was

Under the unique circumstances here, we do not view the Respondent's closing of the lab as a decision to change an established term or condition of employment in the manner contemplated by *Katz* and its progeny. Nor do we view the Respondent's actions as conduct that would tend to "minimize[] the influence of organized bargaining" or "emphasize[] to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview*, supra at 755 (quoting *Loral*, supra at 449). Therefore, we find that it would not effectuate the purposes of the Act to hold that the Respondent was obligated to bargain over closing the dental lab and returning Cornejo to his duties as CSR dental assistant. Accordingly, we reverse the judge and dismiss that allegation.[13]

Our dissenting colleague treats this case as one where an employer makes a decision to *change* its operation from one where the dental lab work is performed in-house to one where that work is subcontracted. The facts of this case are to the contrary. The Respondent made an initial business decision at this clinic, and indeed at all of its clinics, to subcontract dental lab work rather than perform it in-house. There is no contention that this original decision, involving the scope and character of the business, was a mandatory subject. This case involves steps taken by the Respondent to assure that this original decision was being effectuated.

We recognize that the Respondent's action had an impact on an employee. However, the fact that an action affects employees does not necessarily mean that the action is a mandatory subject (e.g. a decision to go out of business). In our view, to impose a bargaining obligation here would be to undercut an employer's right to originally decide the scope of its business, and then to assure that this decision is being effectuated.

B. Effects of Closing the Dental Lab and Returning Cornejo to Sterilizing Equipment

For the same reasons stated above, we find that it would not effectuate the purposes of the Act to mandate bargaining over the effects of closing the dental lab and returning Cornejo to his duties as CSR dental assistant. Finding that an employer is obligated to engage in effects bargaining presupposes that the employer has made a decision to change its operations in a manner that affects employees. See, e.g., *First National Maintenance*, supra at 679 fn. 15 (employer required to bargain over effects of the decision to close part of its business); *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995) (employer required to bargain over effects of decision to start producing a regular 10 p.m. news program). The Respondent here never made a decision to operate an expanded dental lab or to create a dental lab technician position in which a unit employee would manufacture dental appliances.[14]

To the contrary, the Respondent decided in March 2002 not to do so. In April 2003, the Respondent acted to bring its operations into conformity with the 2002 decision, which the Respondent had just discovered had been disregarded by Narvaez. In its unusual factual context, this case cannot be analogized to other decision- and effects-bargaining cases, in which an employer makes a managerial decision to change or discontinue some facet of the business it had previously knowingly established. Accordingly, we find that the Board's decisions imposing an effects-bargaining obligation are inapplicable here, and that it would not effectuate the purposes of the Act to require effects bargaining. We thus reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union timely notice and an opportunity to bargain over the effects of closing the dental lab and reassigning Cornejo to sterilizing dental equipment.

C. Refusal to Bargain Over Wages

The judge also found that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's April 4 request to bargain over the wage for the dental lab technician position. We agree for the reasons stated below, but we modify the judge's remedy to conform to the limited duration of the violation.

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authorized to expand the scope of the Respondent's in-house services by creating an expanded dental lab and assigning lab work to Cornejo. Moreover, neither Cornejo nor any of the other unit employees allegedly affected by the closure of the lab testified as to their beliefs about Narvaez' authority.

[13] The dissent contends that in making this determination, we have improperly disregarded the impact of closing the lab on unit employees. We disagree. Because this case is not analogous to existing Board or court precedent, we must evaluate the circumstances as a whole—not just the effect on employees—and consider the nature of the Respondent's action to determine whether finding a violation is consistent with the principles of Sec. 8(a)(5) and with Board and court precedent governing unilateral changes. Here, it is not.

The cases cited by the dissent on this issue are distinguishable. *Litton Systems*, 300 NLRB 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992), involved an employer's unilateral decision to discontinue an annual wage increase that was well established through the employer's own past practice. See id. at 418–419. *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993), involved an employer's unilateral decision not to continue paying 100 percent of employees' health insurance premiums, contrary to the status quo established by the parties' expired collective-bargaining agreement. Neither case comes close to the unique facts present here. A rogue operation such as Cornejo's lab work cannot establish the Respondent's past practice where the Respondent was not even aware of the practice.

[14] We recognize that an employer can have a duty to bargain about effects of a change, even if there is no duty to bargain about the underlying decision to make the change. However, in the instant case, as shown, there was no decision to make a change.

As of April 4, Cornejo was performing dental lab work outside his classification as CSR dental assistant. During the April 4 bargaining session, members of the Respondent's bargaining team, after talking to Narvaez about Cornejo's work, took the position that Cornejo was classified as a dental lab technician. The Union requested bargaining over the wage for that position, and the Respondent refused. Wages are a mandatory subject of bargaining. See Section 8(d); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). Therefore, the Respondent's April 4 refusal to bargain violated Section 8(a)(5) and (1).

By April 9, however, Riojas had learned of Narvaez' unauthorized continuation of the dental lab and had ordered that Cornejo resume his original duties as a CSR dental assistant. At that time, Cornejo ceased performing dental lab work, and the lab was closed. Any further bargaining over the wages to be paid for that work would have been moot. Therefore, although we agree with the judge that the Respondent violated Section 8(a)(5) and (1), we find that the Respondent's bargaining obligation is limited to the period from April 4 to April 9. We shall amend the judge's remedy accordingly.

AMENDED REMEDY

As stated above, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's April 4 request to bargain over wages for the dental lab technician position, work that Cornejo was still performing on April 4.

The judge's recommended Order requires the Respondent, without limitation, to "[b]argain . . . over wages to be paid to employees working in the dental lab technician position . . . ." The violation of Section 8(a)(5) and (1) occurred on April 4, when the Union requested bargaining and the Respondent refused. The issue was moot by April 9, when Cornejo ceased performing dental lab work and the lab was closed. Therefore, we shall order the Respondent to bargain over Cornejo's wages for the period April 4 to April 9 only.

ORDER

The Respondent, Sea Mar Community Health Centers, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Office and Professional Employees International Union, Local 8, over wages to be paid to Jose Cornejo for dental lab work performed outside his classification as CSR dental assistant from April 4–9, 2003.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) On request, bargain with the Union, as the exclusive representative of employees in the following appropriate unit, over wages to be paid to Jose Cornejo for dental lab work performed outside of his classification as CSR dental assistant from April 4–9, 2003:

> All employees employed by Sea Mar Community Health Centers; excluding managers, confidential employees, contracted employees, temporary employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 28, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

For more than a year, the Respondent operated a dental lab. The operation of that lab had actual effects on the terms and conditions of unit employees. By April 2003, when the Respondent closed the dental lab, employee Jose Cornejo had been performing dental lab work for more than a year with the knowledge and at the direction of Dental Director Alex Narvaez. The closing of the lab and the reassignment of Cornejo in turn resulted in the layoff, reassignment, or reduction in hours of several other employees. Nevertheless, the majority treats the Respondent's decision to close its dental lab and subcontract the lab work as a nonmandatory subject of bargaining, because Dental Director Narvaez did not have his superiors' permission to create the position of dental lab technician in the first place. Effectively creating an "ultra vires" defense to the duty to bargain, the majority errs in finding no "change" in terms and conditions of employment. I dissent and would adopt the judge's decision that the Respondent violated Section 8(a)(5) and (1) by unilaterally closing the lab and subcontracting the lab work.[1]

I.

An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in terms and conditions of employment without first giving the union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Subcontracting is a mandatory subject of bargaining if it involves the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Torrington Industries*, 307 NLRB 809 (1992).

Whether or not Dental Director Narvaez' superiors authorized the dental lab, it was an ongoing operation for over a year. The closure of the lab was a unilateral decision, made without bargaining with the Union. The closure, and the subcontracting of the lab work, resulted in changes to employees' duties and work hours and the layoff of an employee.

As the judge correctly reasoned, the subcontracting essentially replaced one group of employees with another. The Respondent continues to prescribe and fit dentures and dental appliances—the products Cornejo had fabricated in the dental lab—for its patients, and simply uses an outside lab, rather than a unit employee, to fabricate the appliances. Accordingly, under *Fibreboard* and *Torrington*, the Respondent's decision to subcontract dental lab work was a mandatory subject of bargaining, and, under *Katz*, the Respondent violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the decision.[2]

For the reasons stated by the judge, the Respondent also violated Section 8(a)(5) and (1) by failing to give the Union timely notice and an opportunity to bargain over the effects of the decision.[3]

II.

The majority disagrees, effectively sustaining an ultra vires defense to the Respondent's duty to bargain. Remarkably, the majority concludes that, because the Respondent's CEO Rogelio Riojas and Deputy Director Mary Bartolo never authorized Narvaez to operate the in-house dental lab in the first place, and were unaware until April 2003 that he had done so, it had no duty to bargain

[1] I join the majority in finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain over wages for the dental lab technician position, but I would not limit the remedy to the 6-day period between the Union's bargaining request and the closure of the dental lab. Instead, I would adopt the judge's recommended Order requiring that the Respondent, inter alia, reinstate the dental lab as it existed prior to the unilateral subcontracting of dental lab work, reinstate Jose Cornejo to his former position as dental lab technician, and bargain with the Union over the wages to be paid to employees working in the dental lab technician position.

[2] The judge correctly rejected the Respondent's argument that its decision represented a change in the scope or direction of the business and therefore was not a mandatory subject of bargaining. The parties stipulated that:

> all work and services formerly performed by Jose Cornejo in the dental lab continue to be performed and provided to the clients and patients of [the Respondent] by outsourced vendors. The scope and direction of the Respondent's enterprise has not changed with respect to the availability of these services to our patients.

Moreover, the judge properly rejected the Respondent's argument that labor costs were not a consideration in the decision. The testimony of Deputy Director Mary Bartolo, summarized in the judge's decision, shows that labor costs were a factor, even though they were not the sole factor.

[3] Indeed, the Respondent would be obligated to bargain over effects even if the decision itself were not a mandatory subject of bargaining. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 fn. 15 (1981) (employer's decision to close part of its business was not a mandatory subject of bargaining, but "[t]here is no doubt that petitioner was under a duty to bargain about the results or effects of its decision . . .").

over its closure. In the majority's view, by closing the lab and subcontracting the work, the Respondent simply "restored" its operations to what it had thought them to be since March 2002, when Riojas and Bartolo rejected Narvaez' proposal for an expanded dental lab and Dental Lab Technican position. The majority treats the year-long operation of the dental lab as if it had never occurred and rejects *Katz* and *Fibreboard* principles because the Respondent never knowingly established the dental lab operation that it now knowingly and unilaterally terminates. As the majority acknowledges, its reasoning is unprecedented. It is also flawed: under the circumstances, the fact that the operation of the lab was unauthorized should be irrelevant to the Respondent's obligations under Section 8(a)(5) of the Act.

The Board has rejected employers' attempts to disclaim responsibility for supervisors' acts on the basis that the acts were unauthorized. "[A]n employer is bound by the acts and statements of its supervisors whether specifically authorized or not." *Dobbs International Services*, 335 NLRB 972, 973 (2001); *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 fn. 7 (2001), enfd. 56 Fed. Appx. 811 (9th Cir. 2003).[4] That the supervisor's acts may have been contrary to the employer's policy is not a defense. The Board has held:

> A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.

Sunset Line & Twine Co., 79 NLRB 1487, 1509 (1948); accord *Carpenters Local 405*, 328 NLRB 788, 792 (1999). Similarly, the Restatement (Second) of Agency § 230 provides that "[a]n act, although forbidden . . . may be within the scope of employment."[5]

Narvaez is the Respondent's dental director. He reports directly to CEO Riojas. The Respondent admits that Narvaez is a supervisor under Section 2(11) of the Act and an "agent [of the Respondent] generally." Notwithstanding that admission, the majority mistakenly finds that operating the lab was not within the scope of his employment, and therefore that Narvaez was not an agent for the purpose of operating the lab. But, as the Respondent's dental director, Narvaez is responsible for the clinical aspects of the dental practice in all of the Respondent's clinics. Narvaez has, and has exercised, the authority to approve purchases of dental equipment. Narvaez directly supervises the dentists, who in turn prescribe and fit the Respondent's patients with dental appliances. Thus, operation of the dental lab was within the general area of authority in which the Respondent had empowered Narvaez to act.

The majority also errs in finding that Narvaez lacked apparent authority to operate the lab. Narvaez was a statutory supervisor and a high-level director whom the Respondent empowered to run its dental program. By vesting Narvaez with these responsibilities, the Respondent should have known that employees would perceive Narvaez as having authority to act on the Respondent's behalf with respect to the work performed in the dental clinics. See *Richmond Toyota*, 287 NLRB 130 (1987) (respondent's vice president-general manager had apparent authority to voluntarily recognize the union).

Furthermore, in evaluating whether an employer has made an unlawful unilateral change, the Board must not disregard the unit employees' perspective.[6] Certainly, from the perspective of the unit employees, whether or not Narvaez' superiors authorized the lab is irrelevant to the determination of whether closing the lab changed their terms and conditions of employment. Narvaez trained Cornejo in fabricating dentures and, together with the clinic's dentists, reviewed and approved Cornejo's work. Cornejo's January 2002 and 2003 appraisals refer to his work in the lab.[7] Supervisors beneath Narvaez were aware that Narvaez continued to operate the lab, and employees had no reason to doubt that Narvaez had

[4] See also Sec. 2(13) of the Act ("In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.").

[5] See also *Grouse Mountain Lodge*, supra at 1328 fn. 7 (that respondent may have trained its supervisors against engaging in certain acts and conduct during an organizing campaign does not insulate respondent from liability for supervisor's unlawful interrogation); *Dixie Broadcasting Co.*, 150 NLRB 1054, 1079 (1965) (that supervisor's acts were "unauthorized by, or even contrary to, his employer's instructions" did not discharge employer from responsibility).

[6] Cf. *Litton Systems*, 300 NLRB 324, 419 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992) ("What the employees have known and what they reasonably have come to expect determines whether an issue requires bargaining."); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 784–785 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993) (in determining whether employer made unlawful unilateral change to health insurance premiums, judge erred in "completely disregard[ing] employees' expectations" and "ignor[ing] the impact upon employees in assessing whether the status quo has been maintained").

[7] The evaluations were prepared and signed by Cornejo's immediate supervisor, Jose Gaitan, but they also contain a signature purporting to be that of Clinic Operations Director Shannon Dawes. Dawes did not testify, but other witnesses testified that Dawes reported to Deputy Director Mary Bartolo, was in charge of personnel, budgetary, and operational matters for the Respondent's clinics, and reviewed employee evaluations.

authority to operate the lab and to assign lab work to Cornejo.

Contrary to the majority's conclusion, requiring the Respondent to bargain over closing the lab would effectuate the purposes of the Act. The Act's requirement that parties bargain in good faith over terms and conditions of employment is designed to minimize labor disputes, promoting industrial peace.[8] Excusing unilateral action, as the majority does here, can only breed cynicism and discord.

For the foregoing reasons, Narvaez' lack of permission to operate the dental lab presents only an internal management issue between Narvaez and his superiors. It does not—and legally cannot—affect whether the Respondent's decision to close the dental lab was a change in unit employees' terms and conditions of employment, nor does it render inapplicable the basic principles of *Katz* or *Fibreboard* and *Torrington* that require an employer to bargain before changing terms and conditions of employment. Whether or not Narvaez' superiors authorized the lab, the fact remains that its closure and the subcontracting of the lab work resulted in real changes to unit employees' duties and work hours and the layoff of one employee.

Dated, Washington, D.C. September 28, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Office and Professional Employees International Union, Local 8, over wages to be paid to Jose Cornejo for dental lab work performed outside of his classification as CSR dental assistant from April 4–9, 2003.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union, as the exclusive representative of employees in the following appropriate unit, concerning wages to be paid to Jose Cornejo for dental lab work performed outside his classification as CSR dental assistant from April 4–9, 2003:

> All employees employed by Sea Mar Community Health Centers; excluding managers, confidential employees, contracted employees, temporary employees and supervisors as defined in the Act.

SEA MAR COMMUNITY HEALTH CENTERS

Jo Anne P. Howlett, Esq., for the General Counsel.
Sonia D. Fritts, Esq. (Sebris Busto James), of Bellevue, Washington, for the Respondent.
Shelley Pinckney, Union Representative, of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Seattle, Washington, on September 24 and 25, 2003, upon the General Counsel's complaint that alleged Sea Mar Community Health Centers (Respondent) violated Section 8(a)(1), (3), and (5) of the Act by: (a) refusing to bargain with Office and Professional Employees International Union, Local 8 (Union) regarding the wages to be paid to a newly announced dental lab technician position; (b) by closing its dental lab and reassigning employee Jose Cornejo (Cornejo) from performing dental laboratory duties to performing instrument sterilization duties; and (c) by subcontracting the work Cornejo performed in the dental lab since June 2001 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to these decisions or the effects of the decisions. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Washington nonprofit corporation with an office and place of business in Seattle, Washington (Respondent's facility), has been engaged in the business of providing health and social services. During the past 12 months, Respondent in

[8] "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." *Fibreboard*, supra at 211.

conducting its business operations derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $5000, which originated outside the State of Washington. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

1. Did Respondent violate Section 8(a)(1) and (5) of the Act by:

(a) Refusing to bargain in good faith with the Union about the wages to be paid to employees in the dental laboratory technician position.

(b) Failing to bargain with the Union over the decision or effects of the decision to close the dental lab.

2. Did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to bargain in good faith with the Union over wages to be paid to employees in the dental lab technician position and by refusing to bargain over the decision or the effects of the decision to close the dental lab because employees engaged in activities protected by Section 7 of the Act?

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Introduction

Most of the facts in this case are not in dispute. Respondent provides health care, including dental services to low income people in the Seattle, Washington area. Respondent employs 1000 employees in 28 different facilities, including the dental clinic located at 8915 14th Avenue South in Seattle, Washington. Rogelio Riojas (Riojas) is Respondent's president and chief operating officer, Mary Bartolo (Bartolo) is Respondent's executive vice president, Michael Leong (Leong) is Respondent's vice president for legal affairs, Shannon Daws (Daws) is Respondent's clinic operations director, Dr. Alejandro Narvaez (Narvaez) is Respondent's chief dental officer, and Philip Case (Case) was Respondent's dental manager at the Seattle dental clinic.

Since at least 2000, the Union has been the exclusive collective-bargaining representative of all Respondent's employees excluding managers, confidential employees, contracted employees, temporary employees, and supervisors as defined in the Act. Respondent and the Union were parties to a collective-bargaining agreement effective from April 1, 2000, through March 31, 2003.[1] A successor agreement was entered into in August 2003. Shelley Pinckney (Pinckney) is the Union's representative who administered the collective-bargaining agreement with Respondent. Eric Smith (Smith) was the Union's chief negotiator beginning in March 2003.

2. The dental lab

Respondent employed Jose Cornejo (Cornejo) as a CSR dental assistant in the Seattle dental clinic beginning May 14, 2001, to sterilize dental equipment. In late 2001, Respondent expanded its dental lab in the Seattle dental clinic and assigned Cornejo to work full time in the lab fabricating dental prosthetics such as temporary and partial dentures and flippers. Dr. Narvaez said he expanded the dental lab because he thought it would be productive. In February or March 2002, Bartolo became aware that Cornejo was performing work as a dental technician in the dental lab and told Dr. Narvaez that he had to go through Respondent's process to create the new dental laboratory technician position. Accordingly, Dr. Narvaez created a job description for dental laboratory technician and gave it to Bartolo. At the end of March 2002, Dr. Narvaez met with Riojas and Bartolo to propose creating the dental laboratory technician position, the duties of which Cornejo was in fact performing. Dr. Narvaez said he was creating the new position to save money. However, neither Bartolo nor Riojas thought the position was cost effective because Respondent would have to hire new employees to replace the CSR dental assistant. Riojas also expressed concern that the lab would take space that could be used for a dentist and denied creation of the dental laboratory technician position. Bartolo told Dr. Narvaez that Cornejo had to perform his duties as a CSR dental assistant. However, Dr. Narvaez allowed Cornejo to continue performing his duties fabricating dental prosthetics in the lab.

In December 2002, Cornejo approached Pinckney and told her his official job title was CSR dental assistant but that he was performing other work in the Seattle dental lab. Cornejo asked if the Union could assist in having a new job position created to reflect his actual duties in the lab.

In January 2003 the Union began the process of bargaining a successor collective-bargaining agreement with Respondent. As a result of Cornejo's request, in late March 2003 the Union gave Respondent a proposal, section 16.3(a) JOB DESCRIPTIONS[2] which provided Respondent would periodically review and update job descriptions. Members of Respondent's bargaining team, Carolina Lucero (Lucero), Respondent's vice president for long term care and Judith Puzon (Puzon), Respondent's preventative health services director, asked why the Union needed this language and the Union gave Cornejo as an example of an individual working out of his job classification. After the bargaining session, Lucero and Puzon discussed the Cornejo job classification with Dr. Narvaez who provided them with the dental laboratory technician job description[3] he had created in March 2002.

At the April 4, 2003, bargaining meeting Puzon gave the Union the dental laboratory technician job description. Puzon said they had looked into the Cornejo situation and he was not classified as a CSR dental assistant but as a dental laboratory technician as reflected in General Counsel's Exhibit 9. Pinckney said the Union had never heard of a dental laboratory technician and it was not listed in the salary schedule attached to the collective-bargaining agreement.[4] Pinckney said since the dental laboratory technician position did not exist, Respondent had to bargain over the position. Puzon said the position did exist and Respondent did not have to bargain since $10.40 an hour, the amount paid to the CSR dental technician, is enough.

[1] GC Exh. 6.

[2] GC Exh. 8.

[3] GC Exh. 9.

[4] GC Exh. 6 at 28–29.

After the April 4 bargaining session, Riojas and Leong met with Dr. Narvaez. Leong asked if Cornejo was still doing dental lab work. Dr. Narvaez replied that he was. Riojas said he did not approve the position since he did not want to exchange patient care areas for a laboratory. Dr. Narvaez said we did not have the equipment to furnish a patient care room.[5] Riojas told Dr. Narvaez to cease operating the dental lab and to return Cornejo to his original duties as CSR dental assistant. On April 9, 2003, Cornejo was reassigned to the CSR dental assistant position and Respondent sent the denture work Cornejo had been performing to outside labs.

By the time of the April 10, 2003 bargaining session, the Union had learned Respondent had shut the Seattle dental lab and reassigned Cornejo to the CSR dental assistant position. Just before the meeting, Pinckney called Cornejo's supervisor, Case, and told him to stop making changes and to bargain about the changes. At the bargaining session on April 10, chief Union Negotiator Smith told Lucero and Puzon that the Union was aware the dental lab had been closed and that Respondent had to stop making changes and bargain. Puzon said they would not bargain and Lucero said we don't take orders from you. Both then walked out of the meeting.

Since early April 2003 all of the denture work, which had been made by Cornejo in the dental lab, continues to be offered and provided to Respondent's patients. However, this work is now subcontracted to non-unit vendors. As stipulated by Respondent, this outsourcing of unit work does not represent any type of change in the scope of work or services offered by Respondent to its clients or patients.[6]

In addition to the Union's oral requests at the bargaining table to bargain over the decision to close the dental lab, the Union, beginning on April 1, 2003, sent written requests to Respondent to bargain over both the decision and effects of the decision to close the lab.[7] On April 16, 2003, Respondent offered to bargain with the Union over the effects of its decision to close the lab.[8]

B. The Analysis

The General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain over wages paid to the dental lab technician and over the decision and effects of the decision to close the lab. The General Counsel argues that Respondent's decision to close the lab and subcontract out unit work is a mandatory subject of bargaining controlled by the *Fibreboard*[9] line of cases. In addition counsel for the General Counsel argues that Respondent's actions in refusing to bargain over wages, in closing the lab and subcontracting out the unit work violated Section 8(a)(1) and (3) of the Act since these actions were taken in retaliation for employees' exercise of their Section 7 rights.

Respondent takes the position that its decision to close down a part of its business is not a mandatory subject of bargaining as set forth in *First National Maintenance.*[10] Respondent contends it did not violate Section 8(a)(3) of the Act since there is no evidence of antiunion animus.

1. The law

In *Fibreboard,* supra, the Supreme Court affirmed the Board's second *Fibreboard* decision[11] and held that the decision to subcontract is a mandatory subject of bargaining. The Supreme Court noted that the company's basic operation did not change as a result of subcontracting as the subcontract involved replacing employees in the extant bargaining unit with those of an independent contractor.

In *Westinghouse Electric Corp.,* 150 NLRB 1574 (1965), the Board interpreted the Supreme Court's *Fibreboard* decision and set forth a series of factors the Board would consider in determining if subcontracting required bargaining. Bargaining over the decision to subcontract would not be required if (1) the subcontracting is motivated solely by economic reasons (2) it is the employer's custom to subcontract various kinds of work, (3) no substantial variance is shown in kind or degree from the established past practice of the employer, (4) no significant detriment results to the employees in the bargaining unit, and (5) the union has had an opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

Later, in *First National Maintenance*, supra, the Supreme Court found no obligation to bargain over the decision to partially close a portion of the employer's maintenance operation with one of its customers. The Supreme Court noted that the employer had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. The Court said the facts in *First National Maintenance* distinguished it from the subcontracting issue presented in *Fibreboard*. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.

In *Otis Elevator Co.,* 269 NLRB 891 (1984) (*Otis Elevator II),* the Board attempted to apply the principles of *First National Maintenance*. In *Otis Elevator II,* the employer transferred and consolidated operations. The Board found the decision was not a mandatory subject of bargaining. The majority focused on whether the employer's decision turns on operating costs.[12] The Board held that since the employer's decision in *Otis Elevator II* turned on "a change in the nature and direction of a significant facet of its business" not on labor costs, the action was at the core of entrepreneurial control and was not amenable to bargaining.[13] The majority distinguished that subcontracting decisions must be bargained under *Fibreboard*

[5] To date the lab has not been converted to a patient care room, referred to as an operatory in the transcript.

[6] Jt. Exh. 9.

[7] Jt. Exh. 1.

[8] Jt. Exh. 3.

[9] *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964).

[10] *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

[11] *Fibreboard Paper Products Corp.,* 130 NLRB 1558 (1961), modified 138 NLRB 550 (1962), enfd. 322 F.2d 411 (DC Cir. 1963), affd. 379 U.S. 203 (1964).

[12] *Otis Elevator II,* at 892.

[13] Id. at 891.

"because in fact the decision turns upon a reduction of labor costs."[14]

Most recently in *Dubuque Packing Co.* 303 NLRB 386 (1991) *(II)*, the Board overruled *Otis Elevator II* and set forth a new test for determining whether an employer's decision to relocate bargaining unit work is a mandatory subject of bargaining. Initially, the Board noted the differences between subcontracting in *Fibreboard* and the decision to close in *First National Maintenance*.

> First, in *First National Maintenance*, the employer "had no intention to replace the discharged employees or to move that operation elsewhere." 452 U.S. at 687. In contrast, *Fibreboard* involved the "replace[ment] [of] existing employees with those of an independent contractor." 379 U.S. at 213. Second, in *First National Maintenance*, the Court was confronted with a decision changing the scope and direction of the enterprise "akin to the decision whether to be in business at all." 452 U.S. at 677. In *Fibreboard*, the employer's decision "did not alter the Company's basic operation." 379 U.S. at 213. Third, in *First National Maintenance*, the employer's decision was based "solely [on] the size of the management fee [the nursing home] was willing to pay." 452 U.S. at 687. In *Fibreboard*, "a desire to reduce labor costs ... was at the base of the employer's decision to subcontract." *First National Maintenance*. 452 U.S. at 680.[15]

The Board went on to articulate its new test in determining if decisions to relocate are mandatory subjects of bargaining.

> Based on the foregoing considerations, we announce the following test for determining whether the employer's decision is a mandatory subject of bargaining. Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.[16]

Whether or not there is an obligation to bargain over a decision to contract out or transfer bargaining unit work, there is a duty to bargain over the effects of such decisions. The employer must afford the union an opportunity to bargain in advance of the implementation of the employer's decision. *John R. Crowley & Bros*, 297 NLRB 770 (1990).

Finally, Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's, "tenure of employment . . . to encourage or discourage membership in any labor organization."[17]

In 8(a)(3) cases the employer's motivation is frequently in issue, therefore the Board applies a causation test to resolve such questions. *Wright Line*, 251 NLRB 1083, 1088 (1980). The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. "The critical elements of discrimination cases are protected activity known to the employer and hostility toward the protected activity." *Western Plant*, 322 NLRB 183, 194 (1996). Although not conclusive, timing is usually a significant element in finding a prima facie case of discrimination. Id. at 194.

1. The discussion

In applying the principles set forth above, I find that Respondent's decision to close the dental lab was a mandatory subject of bargaining. The nature of Respondent's decision is more akin to the *Fibreboard* subcontracting decisions than the *First National Maintenance* partial closing decisions.

Initially, the facts of this case, unlike the *First National Maintenance* facts, reflect that Respondent did not close down a portion of its business but rather reverted to its practice of subcontracting out virtually all of its dental prosthetic work for its patients. Respondent's operation continued unchanged. Respondent's decision to close the lab and subcontract the prosthetic work is not analogous to an employer who goes out of business or opens a new business. Respondent continued to provide dental care and dental prosthetics to patients. The work Cornejo performed for Respondent was again performed by outside contractor's employees. Most significantly, Respondent's decision turned on labor costs and was amenable to the process of collective bargaining. Respondent's witness, Bartolo testified that when the initial decision was made in March 2002 not to have in house dental labs, a significant factor in Respondent's decision was that it would not be cost effective since additional employees would have to be hired. In *Torrington Industries*, 307 NLRB 809 (1992), the Board held that in a *Fibreboard* situation the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment--is a statutory subject of bargaining under Section 8(d). In such cases the Board found it is unnecessary to apply any other tests:

> Such decisions, as the Court in *First National Maintenance* agreed, do not involve "a change in the scope and direction of the enterprise" and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation de-

[14] Id. at 893.
[15] *Dubuque Packing Co. (II)*, 390–391.
[16] Id. at 391.
[17] 29 U.S.C. § 158(a)(3).

> fined in the Act. 452 U.S. at 677 citing *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring). Thus, when the record shows that essentially that kind of subcontracting is involved, there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is. See also *First National Maintenance, supra*, 452 U.S. at 687-688 (emphasizing that the decision at issue there involved discharging employees without replacing them).[18]

Accordingly, I find that Respondent's decision to close the dental lab was a mandatory subject of bargaining. *Torrington Industries*, supra. In closing the dental lab without giving the Union an opportunity to bargain over the decision to close, Respondent violated Section 8(a)(1) and (5) of the Act.

Further, by refusing to bargain over wages of the dental lab assistant position, Respondent violated Section 8(a)(1) and (5) of the Act. The testimony is uncontradicted that on April 4, 2003, Pinckney demanded bargaining over the wages to be paid to the dental lab assistant and that Respondent refused. By the time the parties returned to the bargaining table, Respondent had closed the lab, rendering any further bargaining over wages moot.

Respondent decided to close the dental lab for the second time on or about April 4, 2003. The Union was not formally notified of this decision until April 10, 2003, after Respondent had already closed the lab and on April 16, 2003, Respondent offered to bargain over the effects of its decision to close the lab. Given the untimely nature of the notification to the Union of Respondent's decision to close the lab, the Union was under no obligation to demand effects bargaining and Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide timely notice to the Union to bargain over the effects of Respondent's decision to close the lab. John R. Crowley & Bros., Inc, supra.

With respect to General Counsel's contention that Respondent's decision to close the lab violated Section 8(a)(1) and (3) of the Act, I find that General Counsel has failed to establish a prima facie case. Anti union animus is an essential element of an 8(a)(3) violation. Here the record is devoid of any hostility by Respondent toward the Union or any of its members. The decision to subcontract the dental lab work, as noted above, was based on economic considerations, rather than employees' exercise of their Section 7 rights. While at first blush the timing of Respondent's ultimate decision to close the lab is suspicious since it coincided with the Union's demand to bargain over inclusion of the dental lab technician in the collective-bargaining agreement, it must be remembered that the decision to close the lab had been made over a year before. It was only Dr. Narvaez insubordinate decision to retain the dental lab that produced the issue during bargaining in 2003. I find the essential element of anti union animus lacking in this case and that Respondent did not violate Section 8(a)(1) or (3) of the Act by refusing to bargain over wages, by closing the lab and subcontracting out the unit work. I will dismiss that portion of the complaint.

[18] *Torrington Industries*, 307 NLRB 809, 810 (1992).

CONCLUSIONS OF LAW

1. By refusing to bargain in good faith over wages to be paid to employees in the position of dental lab technician and by refusing to provide notice or an opportunity to bargain in good faith over Respondent's decision and the impact of that decision to close its dental lab and subcontract the dental lab work, Respondent Sea-Mar Community Health Centers violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. Respondent Sea-Mar Community Health Centers has not otherwise violated Section 8(a)(1) or (3) of the Act, as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having refused to bargain in good faith over the decision and effects of its decision to subcontract dental lab work and over the wages to be paid to the dental lab technician, must reinstate the extended dental lab as it existed prior to its closure on or about April 10, 2003, restore Jose Cornejo to his duties as dental lab technician, and bargain with the Union over the wages to be paid to employees working in the dental lab technician position.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Sea-Mar Community Health Centers, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Office and Professional Employees International Union, Local 8 over wages to be paid to employees in the dental lab technician position.

(b) Refusing to bargain in good faith with Office and Professional Employees International Union, Local 8 over its decision or the effects of its decision to subcontract dental lab work.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, reinstate the dental lab as it existed prior to its closure on April 10, 2003.

(b) Offer to restore Jose Cornejo to the performance of his duties as a dental lab technician in the dental lab.

(c) Bargain with Office and Professional Employees International Union, Local 8 over wages to be paid to employees working in the dental lab technician position and over the decision and the effects of any decision to close the dental lab.

(d) Within 14 days after service by the Region, post at its facility in Seattle, Washington, copies of the attached notice

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, California, December 24, 2003.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Office and Professional Employees International Union, Local 8 regarding wages to be paid to employees in the dental lab technician position.

WE WILL NOT refuse to provide notice or an opportunity to bargain in good faith over the decision or the effects of the decision to close the extended dental lab located at our dental clinic at 14th Avenue S in Seattle, Washington.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, reinstate the extended dental lab as it existed prior to its closure on April 10, 2003.

WE WILL restore Jose Cornejo to the performance of his duties as a dental lab technician in the dental lab.

WE WILL bargain in good faith with Office and Professional Employees International Union, Local 8 over the wages to be paid to employees in the dental lab technician position.

SEA MAR COMMUNITY HEALTH CENTERS

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."